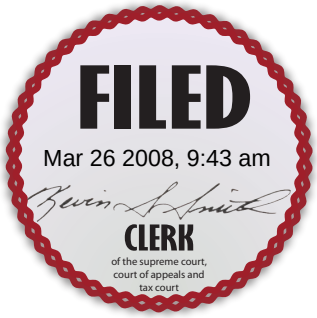

ATTORNEY FOR APPELLANT:

FLORENCE ANNE BRIGGS
Briggs Law Office
Flora, Indiana

ATTORNEY FOR APPELLEE:

RICHARD D. MARTIN
Martin & Stuard Law Office
Frankfort, Indiana

IN THE
COURT OF APPEALS OF INDIANA

SHARON MCLAVEY-FORD,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 12A04-0712-CV-681
	)	
GARY W. FORD,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE CLINTON CIRCUIT COURT
The Honorable Linley E. Pearson, Judge
Cause No. 12C01-0510-DR-464

March 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Sharon McLavey-Ford ("Wife") appeals from the trial court's order ("Order") denying her motions to set aside a property settlement agreement without a hearing. On appeal Wife raises three issues for review, and Gary W. Ford ("Husband") raises two additional issues. We consolidate those issues and restate them as:

1. Whether the trial court abused its discretion when it did not hold a hearing on Wife's motions.

2. Whether Wife's Notice of Appeal was timely filed.

3. Whether the trial court abused its discretion when it denied Wife's motions.

We affirm the Order and remand.

FACTS AND PROCEDURAL HISTORY

Husband and Wife were married on November 17, 1990. On October 14, 2005, Husband filed a petition for dissolution of marriage. Wife hired counsel to represent her in the matter. On Husband's praecipe for hearing, the trial court set the case for final hearing on January 24, 2006, as a first choice setting. In the following months, the final hearing was continued several times on motions by Husband or Wife, until Husband again filed a praecipe for hearing on December 5, 2006. The trial court reset the final hearing but then continued the same on its own motion.

On July 16, 2007, Husband again filed a praecipe for final hearing, and the trial court set the final hearing for September 13, 2007. On that date, the parties appeared for the final hearing with their respective counsel. After negotiations, the parties advised the trial court that they had reached an agreement regarding property division ("Settlement

Agreement"). In open court, they presented a two-page handwritten agreement that was signed by the parties. The hearing proceeded as follows:

Court:	510-DR-464, and this is In Re the Marriage of Gary Ford and Sharon McLavey-Ford?
Wife:	Yes.
Court:	We are here today on a final. I understand we have an agreement; is that correct—that could be cited on the record and affirmed by the parties?
Wife's Counsel:	Yes, your Honor.
Husband's Counsel:	Actually, we have it written.
Court:	Oh, okay.
Wife's Counsel:	We have a draft written that both parties signed.
Court:	Oh, okay, fine.
Husband's Counsel:	And, attached to it (indiscernible)—accompanying it is a green personal—a green sheet with a personal property list.
Wife's Counsel:	I attached –
Husband's Counsel:	—oh— (indiscernible) –
Wife's Counsel:	—(indiscernible) as Exhibit 1.
Court:	Excuse me?
Wife's Counsel:	This is the original and it's marked as Exhibit 1.
Court:	Oh, okay. Okay, the original, is here as Exhibit 1.
Wife's Counsel:	And it's been signed by both parties.
Court:	And, signed by both parties.

Wife's Counsel: And, then we will submit the formal documents by way of decree and qualified domestic relations order. [Husband's Counsel] will be doing the decree and I'll be doing the qualified domestic relations order.

Court: Okay. So, we—

Husband's Counsel: (indiscernible)

Court: —probably need to—to put on the—the statutory grounds and the proof (indiscernible) —

Husband's Counsel: We—we would stipulate as to the statutory grounds and that there's an irretrievable breakdown of the—of the marriage.

Court: Okay. Is that correct?

Wife's Counsel: That is correct, your Honor.

Court: All right. So, parties affirm this? Gary Ford, all this is—is affirmed by you today?

Husband: Yes.

Court: And—and Sharon McLavey-Ford, affirmed by you? Yes?

Wife: Yes.

Court: Thank you. Then the Court will approve the—the divorce and the agreement between the parties and so, decree it today. I—I don't have to have anything under oath unless the parties wanna make sure that it's under oath. Is —

Husband's Counsel: —I think it's—I'm satisfied, Judge.

Court: Okay. You satisfied also?

Wife's Counsel: Yes, your Honor.

Court: All right. Then that—that will be decreed as today. But I won't sign it until I receive a copy from the—

[Husband's] counsel who will write it up, I believe. Normally we have the petitioner's—

Husband's Counsel: —yep, I'm doing it.

Court: Okay. And write it up and, and I will sign it the date I receive it. But, it's—

Wife's Counsel: —okay, and then we submit the QDRO order—

Court: —it's divorced [sic] as of today. Excuse me?

Wife's Counsel: We will submit the QDRO.

Court: Oh, that's great. Thank you. All right.

Transcript at 3-5. The trial court then concluded the hearing. The CCS entries for September 13, 2007, read as follows:

> Parties appear in person and by counsel. Dissolution stipulated to and agreement affirmed by parties. Court grants dissolution and approves agreement. Counsel shall submit orders.
>
> * * *
>
> DECREE OF DISSOLUTION: That the marriage of Gary W. Ford and Sharon K. McLavey-Ford is hereby dissolved and the parties are restored to the status of unmarried persons, effective 9-13-07. The Wife's former name of "McLavey" is hereby restored. fl

Appellant's App. at 3.

The next day, on September 14, 2007, Wife terminated her trial counsel[1] and hired new counsel who, on the same date, filed a motion to set aside agreement ("Motion to Set Aside"). On September 19, 2007, Husband filed his response to motion to set aside agreement and request to enter decree of dissolution. On October 5, 2007, Wife's new counsel filed a pleading entitled "MORE DETAILS TO SET ASIDE SETTLEMENT

[1] On September 20, 2007, Wife's trial counsel moved to withdraw her appearance, and the trial court approved that motion.

RENEWED MOTION TO SET ASIDE SETTLEMENT MOTION FOR HEARING" ("Renewed Motion"). Id. at 16. On the same date, the trial court entered its order denying Wife's Motion to Set Aside and Renewed Motion (collectively "Wife's Motions"). Wife now appeals.

DISCUSSION AND DECISION

Issue One: Hearing on Wife's Motions

Wife contends that the trial court abused its discretion when it denied her Motion to Set Aside and Renewed Motion without first holding a hearing. In support, she alleges that she was entitled to a hearing because her motions were timely filed, that she attached to her Motion to Set Aside "relevant documentation to support her request" to set aside the Settlement Agreement, and that "some evidence had to be presented to the trial court verifying the attachments and to indicate that in order to prevent injustice, the alleged Agreement should be changed." Appellant's Brief at 9. But Wife's Motions do not state the rule under which relief is sought. Thus, we must first determine the basis on which Wife requests relief from the Settlement Agreement.

Wife requests relief from the trial court's judgment in both motions, and on appeal she states that the "filings could be interpreted to be Trial Rule 60(B) motions or motions to correct errors under Indiana Trial Rule 59." Appellant's Brief at 8. Wife's Motions do not assert a trial court error, nor do they raise an issue that she preserved for appeal. As such, Wife's Motions do not state grounds for relief under Trial Rule 59. Instead, we consider Wife's Motions to be requests for relief from judgment filed under Trial Rule 60(B). See Ind. Trial Rules 59, 60; K.E. & W.E. v. Marion County Office of Family &

Children, 812 N.E.2d 177, 179 (Ind. Ct. App. 2004) (treating appeal from denial of motion to set aside judgment terminating parental rights, on grounds of insufficient evidence and lack of due process, as appeal from denial of motion for relief from judgment filed under Trial Rule 60(B)), trans. denied.

We review the grant or denial of a Trial Rule 60(B) motion for relief from judgment under an abuse of discretion standard. Wheatcraft v. Wheatcraft, 825 N.E.2d 23, 30 (Ind. Ct. App. 2005). The trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits. Id. On appeal, we will not find an abuse of discretion unless the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or is contrary to law. Id.

Indiana Trial Rule 60(B) provides, in relevant part:

> On motion and upon such terms as are just the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reasons:
>
> (1) mistake, surprise, or excusable neglect;
>
> (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
>
> (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> * * *
>
> (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4).
>
> The motion shall be filed within a reasonable time for reason[] (8), and not more than one year after the judgment, order or proceeding was entered or taken for reasons (1), (2), (3), and (4). A movant filing a motion for

reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense.

. . .

Wife contends that the trial court abused its discretion when it ruled on Wife's Motions without first holding a hearing. "In passing upon a motion allowed by subdivision (B) of [Trial Rule 60(B)] the court shall hear any pertinent evidence . . . ." Ind. Trial Rule 60(D). "However, a hearing is unnecessary where there is no pertinent evidence." Darling v. Martin, 827 N.E.2d 1199, 1202 (Ind. Ct. App. 2005) (citing Benjamin v. Benjamin, 798 N.E.2d 881, 889 (Ind. Ct. App. 2003)). Thus, we must first consider whether Wife's Motions assert claims that could give rise to pertinent evidence warranting relief under Rule 60(B).

Wife's Motions request relief from the Settlement Agreement because (1) discovery was not complete at the time she executed the Agreement, (2) she disputes the valuation and distribution of assets under the Agreement, (3) Husband sold some items in violation of a pendente lite order prohibiting such sales, (4) some marital assets may not have been distributed in the Agreement; (5) the Agreement contains a mathematical error; and (6) she was not satisfied with her attorney's performance. The action of a trial court in accepting, rejecting, or modifying a property settlement agreement is reviewable as any other division of property, the issue being whether the trial court abused its discretion. Stockton v. Stockton, 435 N.E.2d 586, 589 (Ind. Ct. App. 1982). But a property settlement agreement which is incorporated into a final divorce decree is a binding contract, and the dissolution court may not modify that settlement absent fraud, duress, or undue influence. Adler v. Adler, 713 N.E.2d 348, 354 (Ind. Ct. App. 1999) (citation omitted); see also Ind. Code § 31-15-2-17(c).

Wife's contentions regarding incomplete discovery and the valuation and distribution of assets under the Agreement do not allege fraud, duress, or undue influence. Instead, those claims merely show Wife's buyer's remorse, and such is not a valid basis for setting aside the agreement. See Adler, 713 N.E.2d at 354; see also Ind. Code § 31-15-2-17(c). And because Wife's claim that some marital assets may not have been distributed under the Agreement is premised on her complaint that discovery was not complete, that incomplete distribution claim also must fail. Further, Wife's claim that the Agreement contains a mathematical error is not supported by the record; the handwritten copy of the Agreement that was presented to the trial court at the final hearing contains no computations. And Wife's allegation that Husband sold some items in violation of an order prohibiting such sales pending final hearing is not supported by the record. The CCS does not include any pendente lite restraining order, and Wife has not included any such order in her Appendix.

Wife also seeks relief on the ground that her former attorney "failed to adequately communicate with her." Appellant's Brief at 10. Specifically, Wife made the following allegations in her Motion to Set Aside:

> (5) Prior to September 13, 2007, [Wife] made numerous attempts to contact her counsel but her telephone calls were not returned and she had no conference with her counsel prior to the [final] hearing. Although her attorney has had [her] contact information she (attorney) failed to keep in contact with [Wife]. She has terminated the services of that attorney and now has employed other counsel.
>
> (6) [Wife] did not understand the procedure on September 13, 2007, and her attempts to ask questions to clarify were brushed off by her counsel or were unpleasant conversations.
>
> * * *

> (8) As a bottom line, [Wife] was not kept informed, did not understand why she had to make the agreement when she did not have the documentation before her to know if the agreement is fair and if it complied with the presumptive 50/50 split of the Indiana statutes.

Appellant's App. at 11. And in her Renewed Motion, Wife alleged that she

> was not well-served by her attorney and was not advised of what she might expect in [the dissolution] case. Her attorney kept advising her that she had to settle and she did not know that she could terminate her attorney and seek other legal counsel at that time. On September 14, 2007, she terminated that attorney and has [sic] obtained other legal counsel.

Id. at 16.

As Husband observes, Wife has not cited to any authority to support her contention that her former counsel's performance is a valid basis for setting aside the Settlement Agreement. Therefore, the issue is waived. See Ind. Appellate Rule 46(A)(8)(a). Waiver notwithstanding, the allegations describing the former attorney's conduct do not state a claim for fraud, duress, or undue influence. Wife apparently realized immediately after the final hearing that she had the option of employing new counsel. Within twenty-four hours of the final hearing, Wife had terminated her former counsel, engaged new counsel, and filed the Motion to Set Aside. Wife's conduct immediately after the final hearing shows that she was capable of taking action against the advice of her former counsel but chose not to do so until after the final hearing.

Finally, Wife's Motion to Set Aside includes one claim that mentions fraud. Specifically, Wife alleged that "[i]f assets have been concealed or sold or destroyed or given away, this may raise an issue of fraud." Appellant's App. at 11. But that allegation merely states a generic claim of fraud in the division of marital property; it does not state

a cognizable claim of fraud under Trial Rule 60(B) regarding the settlement agreement in this case. Likewise, the quoted allegation wholly fails to state a claim sufficient to justify setting aside the property settlement agreement for fraud under Adler or Indiana Code Section 31-15-2-17(c).

On the facts presented, Wife has not stated any valid bases for relief from the Settlement Judgment under Trial Rule 60(B). As a result, no pertinent evidence exists to support a Rule 60(B) claim here, so a hearing would have been futile. Therefore, to the extent that Wife's Motions constitute a request for relief under Rule 60(B), we conclude that the trial court did not abuse its discretion when it denied Wife's Motions without a hearing.

Even if Wife's Motions did not constitute requests for relief under Rule 60(B), the trial court did not abuse its discretion by ruling on the motions without holding a hearing. We do not take issue with the timing of Wife's Motions or the supporting documentation she attached to them. However, Wife has provided no authority showing that she is entitled to a hearing on her motions. A party who does not cite to authority that supports an issue on appeal waives the issue for review. Ind. Appellate Rule 46(A)(8)(a). Thus, here, Wife has waived for review the issue of whether she was entitled to a hearing on her Motion to Set Aside and Renewed Motion.

Issue Two: Notice of Appeal

Husband contends that Wife's notice of appeal was not timely filed within thirty days after the entry of final judgment. Specifically, he alleges that Wife is challenging "the trial court's approval of the [Settlement Agreement] and/or the entry of the Decree

of Dissolution on September 13, 2007." Appellee's Brief at 12. Wife filed her notice of appeal on October 18, 2007, more than thirty days after the entry of the Decree that incorporated the Settlement Agreement. But Wife's appeal is from the trial court's order entered October 10, 2007, which denied her Motion to Set Aside and Renewed Motion. Wife timely filed her notice of appeal from that order on October 18, 2007, within thirty days after the entry of the order. See App. R. 9(A) (deadline for filing notice of appeal is thirty days after entry of final judgment). Thus, Husband's contention is without merit.

Issue Three: Appellate Fees

Husband contends that he is entitled to appellate attorney's fees because Wife brought her appeal in bad faith. In particular, Husband argues that Wife's contentions and arguments demonstrate substantive bad faith in that they are "utterly devoid of all plausibility[,]" her brief disregards the trial court's entry of a Decree, and Wife "fails to present any cogent argument for setting aside the Decree, especially on the issue of the alleged deficiencies of trial counsel." Appellee's Brief at 16. Husband further argues that Wife's "omissions/misstatements regarding the entry of the Decree of Dissolution amount to procedural bad faith." Id. We agree with Husband in part.

We may assess damages if an appeal is frivolous or in bad faith, and the damages shall be in our discretion and may include attorney fees. App. R. 66(E); Trost-Steffen v. Steffen, 772 N.E.2d 500, 514 (Ind. Ct. App. 2002). An award of attorney fees may be ordered when an appeal is without merit, frivolous, or in bad faith. Trost-Steffen, 772 N.E.2d at 514. The award of appellate attorney fees should only be applied when the party's contentions are utterly devoid of all plausibility. Id.

Substantive bad faith "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." Id. (citations omitted). Procedural bad faith "is present when a party flagrantly disregards the form and content requirements of the Rules of Appellate Procedure, omits and misstates relevant facts appearing in the record, and files briefs appearing to have been written in a manner calculated to require the maximum expenditure of time both by the opposing party and the reviewing court." Id.

Here, Wife argues on appeal that she was entitled to a hearing before the trial court ruled on her motions and that the Settlement Agreement should be "changed" because of her former counsel's performance. But Wife did not cite any authority on point to support either of those claims. And Wife has wholly failed to adequately allege any claims of fraud, duress or undue influence, which are the only cognizable bases for setting aside a property settlement agreement. See Adler, 713 N.E.2d at 354; see also Ind. Code § 31-15-2-17(c). Moreover, in her brief, Wife questions whether the trial court ever entered a decree dissolving the parties' marriage. But both the CCS and the transcript demonstrate unambiguously that a Decree was entered, and Husband provided a written copy of the Decree in his appellee's appendix. Wife's questioning of the existence of a Decree and, particularly, her failure to acknowledge the written Decree until her reply brief is disingenuous and do not show good faith.

We conclude that Wife's claims demonstrate procedural bad faith and that Wife's contentions on appeal are utterly devoid of plausibility. As a result, Husband is entitled to appellate attorney fees. Thus, we remand this case to the trial court to determine the proper amount of the appellate fee award.

Affirmed and remanded.

BAILEY, J., and CRONE, J., concur.